90-389

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CASE NO.:

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

SAMUEL BRAEN, JR.
Petitioner

v.

NICHOLAS LAGANELLA AND
P.T.&L CONSTRUCTION CO., INC.
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATEMENT OF THE CASE

A. *Introduction.*

On March 30, 1990, the United States Court of Appeals for the Third Circuit held that petitioner Samuel Braen, Jr. ("Braen") was collaterally estopped from relitigating, in a bankruptcy adversary proceeding, the merits of a state court judgment against him for damages for malicious prosecution. (A 21).[1] Accordingly, the Court of Appeals reversed an Order of the District Court of New Jersey and reinstated an Order of the Bankruptcy Court, granting summary judgment in favor of respondents Nicholas A. Laganella ("Laganella") and P.T.& L. Construction Co., Inc. ("P.T.& L.") on their claim that the state court judgment constituted a non-dischargeable debt for "willful and malicous injury by the debtor" within the scope of 11 U.S.C. Section 523 (a)(6) (A58).

B. *Factual Background.*

In November of 1972, petitioner was indicted for "shortweighting" trucks delivering asphalt for the repaving of the Palisades Interstate Parkway ("PIP") (T2:177-13 to 18; (JA 392); T2:179-22 to T2:180-1; T4:587-4 to 9 (JA 409); T4:596-10 to 12 T5:718-8; T5:728-11 to 12 (JA 436)).[2] In plea discussions, the

[1]A-refers to the Appendix to the Petition for Writ of Certiorari filed by Braen.

[2]T-refers to the five (5) bound volumes of trial transcript filed by the Braen and his co-defendants in the Superior Court of New Jersey, Appellate Division, followed by a prefix number designating the particular transcript volume, and page and line references. Transcript references without a volume prefix are to the trial testimony of Nicholas Laganella taken on November 9, 1983 in the Superior Court of New Jersey, Law Division, Bergen County. The Bankruptcy Court had the entire trial record before it in making its determination to grant summary judgement.

JA-refers to the Joint Appendix filed with the Court of Appeals.

New Jersey Division of Criminal Justice (the "Division") steadfastly refused to agree to a non-custodial term for Braen (T4:677-10 to T4-678-2; T2:731-4). As a result of the PIP indictment, the New Jersey Department of Transportation ("DOT") suspended the rights of all Braen companies to bid on, or perform, State construction contracts (T2:181-17; T5:729-11 (JA 437)). State work was the principal source of business for the Braen companies, which were involved in highway construction and the supply of road-building materials to other contractors (T4:673-11).

Braen's criminal activities had not been limited to just those cited in the PIP indictment. Over the years, Braen had bribed public officials to obtain a building permit for a Braen concrete plant, to reduce the tax assessment on a Braen company property and to induce neglect of duty by road inspectors and police officers. He had colluded with other contractors for the purpose of dividing and allocating public works contracts among them. He had also defrauded the public treasury through the use of "shortweighting" schemes in which the Braen companies charged the government for more materials than were actually delivered (T4:592-11 to T4:594-18; T4:597-17 to T4:599-9; T4:602-15; T4:631-6 to T4:631-15).

Braen and his companies retained Raymond Bergan, Jr., Esquire, of the Washington law firm of Williams, Connelly & Califano, to represent them (T4:589-2 to 6 (JA 411); T4:683-9). On the eve of the trial of the PIP indictment, Bergan arranged a plea bargain

with the Deputy Attorney General Michael Bozza ("Bozza"), the prosecutor in charge of the case for the Division. Braen decided to barter information in exchange for his freedom and the restoration of the Braen companies' rights to do business with the State (T2:184-14; T4:667-12 to 24).

Pursuant to the plea agreement, the State committed not to prosecute Braen, his father (Samuel Braen, Sr.), the Braen companies and their officers and employees for any of their criminal activities. The Division also promised to intercede with the DOT to have the Braen companies reinstated as eligible bidders on highway construction contracts.[3] Finally, the Division agreed to dismiss the PIP indictment as to Braen. In return, Braen agreed to cooperate with the State and provide information, enabling the Division to prosecute those responsible for political corruption and the commission of other criminal offenses in the construction industry (T2:173-1 to 9; T2:188-17 to T2:189-4; T2:198-11 to 25; T4:666-5; T4:672-19 (JA 423); T4:682-15 to T4:684-13; T5:729-25 to T5:730-7 (JA 437, 438); T5:744-11 to T5:745-5 (JA 449, 450)).

Braen and Bergan met with Deputy Attorney General Bozza and other Division employees on January 7, 1974. The interview

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[3]Representatives of the Division testified on behalf of Braen, Sr. and the Braen companies at administrative proceedings held before the DOT in 1975 on their restoration application. (T2:198-16; T4:690-16 to T4:691-16; T5:742-25 to T5:743-2; T5:744-11 to T5:745-5). Braen had resigned as an officer of various Braen companies at some point after his indictment (T4:638-16; T4:523-18). His decision was prompted by his "father's lawyers" who wanted Braen to resign in order to facilitate the reinstatement of the Braen companies. (T4:523-7 to 13).

was tape recorded in its entirety (JA 453 to 503). Braen told Bozza that Sam Braen Construction Company ("SBCC"), the Braen company engaged in public construction work, had unlawfully conspired with respondents, Nicholas Laganella ("Laganella") and P.T.& L. Construction Co., Inc., ("P.T.& L.") to "rig" the bidding on a contract for the improvement of a section of State Highway Route 23. The purpose of the purported criminal arrangement was to have SBCC submit a "complimentary" or higher bid so that the contract would be awarded to P.T.& L. In return, the Braens were to receive a payment of $185,000 (T2:175-18 to T2:176-5 (JA 390,391); T4:590-10 to 17 (JA 412); T4:591-3 (JA 413); T4:669-10 to T4:670-8 (JA 420,421); T4:671-11 (JA 422); T5:731-22 to T5:732-2 (JA 439, 440) (JA 479-483). Prior to the meeting with Braen, the Division had no information linking Laganella or P.T.& L. to any criminal violations with respect to the bidding on the Route 23 contract (T2:170-5 to 16).

In fact, P.T.& L. and Laganella were completely innocent of the charges made by Braen. P.T.& L. and SBCC had entered into a legitimate business agreement regarding the Route 23 contract. Braen twisted and distorted that agreement in order to avoid imprisonment and forestall the financial collapse of the Braen empire.

In truth, Samuel Braen, Sr. had agreed to have SBCC provide P.T.& L. with "bridge prices" to be incorporated into P.T.& L.'s

bid for the Route 23 contract (T7-23 to 8-9).[4] In return, Laganella promised that, if P.T.& L. were the low bidder, P.T.& L. would subcontract the bridge work to SBCC and purchase the asphalt required for the job from a Braen company (T8-9; T33-7; T1;140-4; T11:154-3). P.T.& L. prevailed as the lowest responsible bidder and was awarded the contract (T28-24; T1:62-3; *Certificate of Award,* Exhibit P-6, in Evidence, T1:91-19, November 10, 1983).

Following the bidding, P.T.& L. received an unsolicited proposal for the Route 23 project from Tri-County Construction ("Tri-County"). Tri-County offered to do the bridge work and to supply the asphalt for approximately $350,000 less than the Braen quote on these contract items (T29:-3 to 5; T42-6 to 17; T1:46-3; T151-23 to T1:153-1; Exhibit P-5, in Evidence, T1:89-11, November 10, 1983).

Laganella then approached Harry Evans ("Evans"), SBCC's Vice President and General Manager, and Braen to negotiate for a release from his commitment to the elder Braen. The parties ultimately agreed that P.T.& L. would pay $185,000 therefor (T31-1 to 10; T33-22; T1:140-4 to 6; T1:154-9 to 13; T1:156-1). P.T.& L. executed a series of promissory notes to evidence its obligation to the Braens (T33-25 to T34-2). Braen was aware that the P.T.&

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[4]Bridge construction was a major part of the Route 23 contract. P.T.&L. typically did excavation, grading and paving on its highway contracts (T1:72-13), with structure work, such as bridges, being done by a specialty subcontractor (T4:10 to 17; T1:143-6). In preparing P.T.&L.'s bid, Laganella had been unable to obtain any subcontractor quotations for the Route 23 bridge work (T6-3).

L. notes constituted the consideration for the release. Braen also knew that the amount of the payment had been calculated so as to compensate the Braen companies for the loss of profit on their subcontracts (T4:625-21 to T4:626-21 (JA 414, 415); T4:643-20 to T4:644-2).

As a result of Braen's false accusation, a State Grand Jury was empaneled to hear the "evidence" concerning Braen's charges (T2:192-5 to 11 (JA 395); T5:735-12; T5:736-2 to 20 (JA 441)). The State introduced Braen as its first witness on January 17, 1974. In response to questions posed by Deputy Attorney General Bozza, Braen gave perjured testimony, incriminating P.T.& L. and Laganella in a purported "bid-rigging" conspiracy (T2:172-3; T4:591-7 to 13). On November 18, 1974, the State Grand Jury returned an indictment (No. SGJ-18-74-15) against Laganella and P.T.& L., charging that they had conspired with Braen, Sr., Braen, Evans and SBCC (all unindicted co-conspirators) to obstruct the due and proper administration of New Jersey's competitive bidding laws in connection with the Route 23 contract (T1:75-3 to 17; T2:192-13 (JA 395); Exhibit P-1A, in Evidence , T1:81-15, November 7, 1983). Laganella and P.T.& L. entered pleas of not guilty. On December 27, 1974, however, the Commissioner of the DOT, acting solely on the basis of the conspiracy indictment, suspended P.T.& L. and Laganella from bidding on the State highway construction contracts. (T1:91-23 to 25; T1:93-1 to 13; T1:78-21 to T1:79-14; Exhibit P-7 in Evidence, T1:92-10, November 10,

1983).

Plaintiffs were tried twice on the conspiracy charge. The first trial (April 1975) terminated when the trial judge dismissed the indictment on grounds of prosecutorial misconduct by Deputy Attorney General Kathy Flicker (T1:81-2 to 8; T1:96-12). On appeal by the State, the Appellate Division reversed and remanded the matter for a new trial. See *State v. Laganella*, 144 N.J. Super. 268, 365 A.2d 224 (App. Div. 1976) app. dism. 74 N.J. 256, 377 A.2d 652 (1976). The second trial, in December 1978, ended with jury verdicts of "not guilty". Judgments of acquittal in favor of Laganella and P.T.& L. were entered on December 28, 1978 (T1:80-18 to 25; Exhibits P-1B and P-1C, in Evidence, November 7, 1983).

C. *State Court Proceedings*

Respondents instituted an action against petitioner and others[5] by Complaint filed February 25, 1980 in the Superior Court of New Jersey, Law Division, Bergen County (JA 133). Respondents sought money damages on a claim for, *inter alia*, malicious prosecution.

Prior to trial, petitioner moved for summary judgment dismissing the Complaint (JA 173)[6]. Braen's attorneys, Amster &

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[5]The other defendants were Samuel Braen, Sr., Harry Evans and Braen Industries, Inc.

[6]Copies of Braen, Jr.'s Notice of Motion, Affidavit and Brief, filed in connection with the summary judgement motion, were submitted as exhibits to respondents' Reply Brief in the Bankruptcy Court.

Rosensweig, contended that respondents' malicious prosecution claim was without merit. They argued Braen could not be held liable since Braen had only communicated what he "...sincerely and honestly believed to be plaintiff's involvement in a crime..." (JA 178-17); his disclosure of respondents' "wrongdoing" to the State was "compelled" by the terms of the plea agreement negotiated with the Division (JA 179-49); his participation in the development of the case against respondents was limited to his debriefing by the Division in January of 1974 (JA 180-30) and his appearance before the State Grand Jury (JA 180-42)[7]; he did "nothing else to actively encourage or assist in the prosecution of plaintiffs" (JA 181-19); and, finally, respondents' debarment from bidding on public contracts "...was the result of usual state administrative procedures and determinations over which neither [Braen] nor anyone else involved in this litigation had any control (JA 181-50)[8]. Thus, the very arguments which Braen asserts are "directly applicable to the facts of this case" and were not made by his attorneys in state court (*Petition*, at page 9) were actually

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[7]Braen's attorneys attached the grand jury testimony of Braen and Evans as Exhibits B and C to the Brief filed in support of the summary judgement motion. This fact undermines the contention raised here that petitioner's attorneys "made no effort to obtain the State's file in this matter", including the State's copies of the grand jury proceedings (*Petition*, at pp. 8-9).

[8]Braen's Brief in support of the motion also substantiates his counsel's awareness of the determination made by Hearing Examiner Leon Gerofsky denying respondents' request for reinstatement to the list of eligible bidders (Brief, "Statement of Facts", at page 4; "Legal Argument", at page 15). Moreover, Braen's counsel urged that Gerofsky's decision established the presence of "probable cause" and a complete defense to respondents' claims: *(Footnote continued on next page)*

presented on the summary judgment motion[9]. In any event, petitioner's motion was denied by Order dated November 14, 1983 (JA 196).

The case was tried before a jury over a two week period in November of 1983. The jury recognized Braen's perfidy, awarding

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> "Whatever the reason for plaintiffs' eventual acquittal on criminal charges, those parties cannot dispute that cause was found to bar them as bidders on public contracts following hearing in which the plaintiffs were complete participants. That fact, coupled with the earlier return of an indictment, compels the conclusion that probable cause existed for the criminal charge lodged against the plaintiffs". (*Brief*, at page 15).

It should be noted in this regard that, under New Jersey law, even the return of an indictment does not conclusively establish the existence of probable cause in a malicious prosecution action where the plaintiff, as here, has contraverted the facts underlying the criminal charge by means of competent evidence. See, e.g., *Lind v. Schmid*, 67 N.J., 255, 266, 337 A.2d 365, 370 (1965); *Zalewski v. Gallagher*, 150 N.J. Super. 360, 368, 375 A.2d 1195, 1199 (App. Div. 1977); *accord, Williams v. Page*, 160 N.J. Super. 354, 389 A.2d 1012 (App. Div. 1978).

[9]Petitioner's position that the applicable legal principles are stated in the unreported opinion in *Jackson v. Hanover Insurance Companies*, Civil Action No. 88-1379, *slip. op.* at page 2 (D.N.J. May 16, 1988) (A 62 *et seq*) and in *Whittaker v. Duke*, 473 F. Supp. 908, 910 (S.D.N.Y. 1979) is mistaken. A person is liable for the tort of malicious prosecution on grounds of having initiated or instituted a criminal proceeding when: (1) he knowingly makes false statements or willfully conceals material facts in reporting to law enforcement officials the grounds upon which he believes a crime has been committed; and (2) a prosecutor commences a criminal proceeding on the basis of the false or incomplete information the informant has provided. The informant is not divested of liability simply because the prosecuting attorney has made an investigation into the allegations or a determination to bring the proceeding, since the false or incomplete information disables the prosecutor from effectively exercising his discretion. *White v. Chicago, Burlington and Quincy Railroad*, 417 F.2d 941, 943-945 (6th Cir. 1969); *Bass v. Spitz*, 522 F. Supp. 1343, 1348-1349 (E.D. Mich. 1981); *Rasmussen Buick-GMC Inc. v. Roach*, 314 N.W. 2d 374, 376-377 (Iowa Sup. Ct. 1982); *Rose v. Whitbeck*, 277 Or. 791, 562 P.2d 188, 191-192 (Sup. Ct. 1977); *Gustafson v. Payless Drug Stores*, Inc., 269 Or. 354,525 P.2d 118, 122-123 (Sup. Ct. 1974); *Drakos v. Jones*, 189 Okl. 593, 118 P.2d 388, 390 (Sup. Ct. 1941); *Restatement (Second) of Torts*, Section 653, Comment g.; Prosser, *Law of Torts* 836-837 (4th ed. 1971). Comment g. to Section 653 of the *Restatement*, in particular, summarizes the accepted principles for assessing liability against informants like Braen who have provided false or incomplete information to government prosecutors. Under Comment g., the subjective "impressions" of the State prosecutors that Braen was not "...out to 'get' anyone..." (*Affidavit of Michael Bozza*, April 7, 1988, Paragraph 9, Pg. 3 (A 75) or that Braen "...did not, in any way, push for indictment of Laganella..." (*Affidavit of Kathy Flicker*, March 30, 1988, Paragraph 7, pg. 3 (A 67) are not relevant, even if their testimony was competent in the first instance.

respondents compensatory damages of $10,175,000 on a special interrogatory verdict (JA 246 to 252) and $150,000 in punitive damages. An Order of Judgment incorporating the verdicts was entered on November 30, 1983 (the "Judgment") (JA 253).

Braen attended each session of the two week trial. He testified at length in his own defense. No application was made for a postponement or continuance of the trial proceedings on account of Braen's medical condition or his alleged poor health[10]. Braen's credibility was impeached on the basis of his own prior inconsistent statements in sworn testimony, and not as a result of the effects of his illness.

Petitioner's complaints as to counsel's handling of the trial do not amount to a deprivation of fundamental rights, rendering the state court proceedings unfair or violative of due process. Petitioner mounted a serious defense, contending that he had told the truth about the alleged bid-rigging conspiracy and that there was probable cause for his allegations. His counsel cross-examined

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[10]Without disparaging Braen's illness, several critical observations are pertinent here. At the outset, the letters from Dr. Robert S. Rigolosi (apparently Braen's treating physician), which were annexed to Braen's Affidavit filed in the Bankruptcy Court (JA 122-128), make no mention at all of the "side effects" of which Braen complains (i.e., low concentration levels, memory loss, communication deficits). Thus, there was no expert medical foundation for the petitioner's conclusion that he was disabled from aiding in the preparation of his defense and from a contributing as a witness at trial. Second, Dr. Rigolosi's letters (all addressed to Braen's counsel) cover only the period from January 23, 1973 (when the Debtor was seeking to avoid prosecution and imprisonment to the PIP indictment) to May 7, 1975 (when the Braen reinstatement hearings took place). Despite the clear relevance of these dates to proceedings in which Braen was to participate, Dr. Rigolosi does not say the condition will impair Braen's ability to stand trial or be a witness. In any event, the state court proceedings here occurred between 1981 and 1983, as to which no medical "evidence" was proffered.

all of respondents' witnesses. Braen called witnesses to testify on his behalf and introduced documentary evidence. His counsel moved for directed verdicts at the conclusion of respondents' case and at the end of the trial. Deputy Attorney General Bozza testified twice at trial, once for plaintiffs and once for defendants. During Bozza's testimony (T2:167 to 201; T5:725 to 746), Bozza made all the points which Braen now says he wanted him to make. Bozza mentioned that Braen was in poor health; that Braen provided only "leads" for the further investigation by the Division; that evidence corroborating Braen's allegations against respondents was furnished by other witnesses, principally, Harry Evans; and that Bozza made the decision to press for an indictment against respondents[11].

On the issue of damages (*Petition*, at page 11), Braen's counsel subjected respondents' expert, William Gerber, C.P.A., to a searching and intensive cross-examination. Counsel probed into the financial facts and accounting foundation for Gerber's conclusions without being able to discredit Gerber. Certainly, counsel's attack on respondents' damage theory provided Braen with his "day in court" on the question and far exceeded minimum

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[11]As for Deputy Attorney General Kathy B. Flicker, a careful review of her affidavit (A 64; JA 359) indicates that her personal knowledge is confined to the events surrounding the preparation for trial and trial of the conspiracy case in April of 1975 (*Flicker Affidavit*, Paragraphs 10 to 14 (A 35, 36). Accordingly, her testimony would have been both irrelevant and immaterial. She was not involved in the actual initiation of the criminal proceeding in January of 1974, the operative event here. Thus, any testimony she could have given at trial would have been of no significance, or at best, cumulative of Bozza's testimony.

due process requirements.[12]

Following the trial, petitioner exercised all remedies available under New Jersey law to challenge the Judgment. Braen, represented by new counsel, made application for a judgment notwithstanding the verdict or for a new trial (JA 261). The trial judge denied the motions in a Letter Opinion dated February 24, 1984 (JA 271 to 295). Braen sought review of the Judgment in the Superior Court of New Jersey, Appellate Division (JA 299). On October 9, 1985, the Appellate Division rejected all of petitioner's arguments and affirmed the Judgment (JA 319 to 353). Braen then petitioned the Supreme Court of New Jersey for certification to the Appellate Division. On September 8, 1986, the Supreme Court of New Jersey denied the petition. 105 N.J. 533, 523 A.2d 174.

D. *Federal Court Proceedings*

One month after the exhaustion of his State remedies, petitioner filed a petition for reorganization under Chapter 11 of the Bankruptcy Code in the Bankruptcy Court of the District of New Jersey.

On December 4, 1986, respondents commenced the instant

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[12]Braen suggests that the introduction and use of the report of the DOT's Hearing Examiner, Leon Gerofsky, would have "...limited Laganella and P.T.&L. to any damages incurred prior to November 10, 1975, a small fraction of the amount actually awarded" (*Petition* at page 11). In point of fact, Braen's counsel argued in his summation that Gerofsky"s findings barred respondents from any recovery at all inasmuch as his determination established the existence of probable cause (T5:826-13). Moreover, petitioner's resort to a complex and attenuated intervening cause analysis overlooks the salient fact that, without the false information initially provided to the Division by Braen, respondents would never have been investigated, indicted and debarred from public construction work.

adversary proceeding. Respondents requested the Judgment be held to be a non-dischargeable debt pursuant to 11 U.S.C. 523(a)(6)(53 JA). Respondents subsequently moved for summary judgment. In support of their motion, respondents relied on the record in the State Court proceedings and the doctrine of collateral estoppel. The Bankruptcy Court, after a review of the entire state court record, granted summary judgment on June 21, 1988, holding the Judgment to be non-dischargeable (A63; JA 50). 87 B.R. 841.

Petitioner appealed to the District Court. On November 18, 1988, the District Court reversed the determination of the Bankruptcy Court and remanded the matter for further proceedings (A62; JA 14). 94 B.R. 35. On January 17, 1989, the District Court amended its Order of November 18, 1988 to certify three appeal questions pursuant to 28 U.S.C. 1292(b)(A 60; JA 16).[13] On March 1, 1990, the Court of Appeals granted leave to appeal pursuant to 28 U.S.C. 1292(b) and *Rule* 5 of the *F.R.A.P.* (A 59; JA 1).

In its opinion issued on March 30, 1990 (A 1 to 22), the Court of Appeals reversed the District Court's Order of November 18, 1988 and remanded the case with instructions to reinstate the Bankruptcy Court's Order. The Court of Appeals concluded that

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[13]The questions certified were: (1) the standard of proof in a dischargeability case under Section 523 (a) (6) of the Bankruptcy Code; (2) whether the tort of malicious prosecution, as defined under New Jersey law, qualifies as a willful and malicious injury under Section 523(a) (6); and (3) whether the Bankruptcy Court erred by not considering the underlying fairness of the state court proceedings before applying collateral estoppel effect to the Judgement.

issue preclusion barred Braen from relitigating whether the Judgment was a debt incurred "for willful and malicious injury by the debtor" in accordance with 11 U.S.C. 523(a)(6). Specifically, the Court held, first, that the state court Judgment, established by a preponderance of the evidence, satisfied the federal evidentiary burden applicable to a claim of nondischargeability under 11 U.S.C. 523(a)(6). Second, the Court ruled that the instructions given to the state court jury, viewed in their totality, enabled to jury to conclude that Braen's conduct fell within the scope of Section 523(a)(6). Finally, the Court determined that Braen was not entitled to a hearing on the issue of whether he had a full and fair opportunity to litigate the issues in the state court proceeding since: (1) the alleged negligence of Braen's counsel did not deprive him of his right to contest respondents' claims for damages; and (2) the medical evidence presented by Braen with concerning the impairment of his ability to participate meaningfully in his defense was not persuasive.

On April 27, 1990, the Court of Appeals denied Braen's petition for rehearing (A 57).

ARGUMENT AMPLIFYING REASONS FOR DENIAL OF A WRIT OF CERTIORARI

ISSUE NO. 1

SINCE THERE IS NO CONFLICT AMONG THE DECISIONS OF THE CIRCUIT COURTS OF APPEAL ON THE ISSUE OF THE BURDEN OF PROOF REQUIRED BY FEDERAL LAW TO SUBSTANTIATE A CLAIM OF NONDISCHARGEABILITY UNDER 11 U.S.C. 523(A)(6) THE REQUEST FOR CERTERIORI SHOULD BE DENIED.

The Court of Appeals held that, under federal law, "...creditors claiming a nondischargeable debt under Section 523(a)(6) must prove a malicious and willful injury inflicted by the debtor by a preponderance of the evidence." (Footnote omitted)(A10); *In re Braen*, 900 F.2d 621, 626. Braen urges that a grant of *certiorari* is appropriate because the Third Circuit's resolution of the question is at odds with the holdings of other Courts of Appeal. On closer scrutiny, it is evident that the conflict is illusory. Accordingly, the Petition presents insufficient grounds on which to invoke this Court's discretionary jurisdiction.

Most of decisions cited in the Petition (at pp. 16-17) concern the standard of proof in fraud cases brought under Section 523 (a)(2). Consequently, those holdings are plainly distinguishable on their facts. Only two federal appellate courts, other than the Third Circuit, have actually discussed the standard of proof applicable under Section 523(a)(6). See, *Chrysler Credit Corp. v. Rebhan*,

842 F.2d 1257 (11th Cir. 1988); *Combs v. Richardson*, 838 F.2d 112 (4th Cir. 1988). Those cases also fail to give rise to a conflict.

The Third and Fourth Circuits, in clear and well reasoned opinions, have concluded that the "preponderance of the evidence" standard furnishes the requisite burden in establishing a claim under Section 523(a)(6). *In re Braen*, 900 F.2d, at 625; *Combs v. Richardson*, 838 F.2d, at 116. The Eleventh Circuit in *Chrysler Credit*, without any real analysis, commented in *dicta* that "clear and convincing evidence" was required to prove the willfulness and malicious of the act cited as the basis for nondischargeability. 842 F.2d, at 1262. However, the Court's view was not essential to its decision, the creditor having shown by overwhelming evidence the diversion and conversion of the trust receipts. Thus, the purported "conflict" among the Circuits dissipates under close scrutiny, being founded upon distinquishable cases decided under Section 523(a)(2) and the abbreviated *dictum* in *Chrysler Credit*.

There is also no need for this Court to review the question in conjunction with its consideration of the Eighth Circuit's decision in *In re Garner*, 881 F.2d, 579, (1989) *cert.* granted *sub. nom. Grogan v. Garner*, ____U.S.____, 110 S. Ct. 1945, 109 L. Ed.2d 308 (1990). In *Garner*, the Eighth Circuit ruled that the standard of proof required to establish a fraud exception to discharge under Section 523(a)(2) is the "clear and convincing" standard. Thus, *Garner*, implicates a different exception to discharge from that at issue here. Morover, as the Court in *Braen* aptly noted, Congress

could not have intended that the Bankruptcy Courts apply a single standard of proof in all non-dischargeability actions, given the broad range of the recognized exceptions. *In re Braen*, 900 F.2d at 625.

Petitioner nonetheless suggests that a combined disposition of the questions presented in *Garner* and in this case will allow the Court to address "...whether there should be a single standard of proof for all exemptions under Section 523(a) or whether the standard should vary with the type of exemption" (*Petition*, at pg. 17). Neither *Garner* nor *Braen* posit that all discharge exceptions are subject to the same standard of proof. The Court is fully capable of settling the "uniformity" issue in any event solely within the confines of its decision in *Garner*. If this Court endorses the approach utilized by the Eighth Circuit in defining the appropriate evidentiary standard in fraud cases under Section 523(a)(2) (as discussed *infra*), approval of the Third Circuit's decision ineluctably follows. The Third Circuit pursued the same line of reasoning as did the Eighth Circuit, albeit to a different result. In contrast, were the Court to determine that it is the preponderance standard which should be applied in discharge matters involving fraud, then, *a fortiori*, the Third Circuit's view that the lesser evidentiary burden is controlling in a case under Section 523(a)(6) may not be criticized. Under either scenario, the Third Circuit's decision remains intact.

While reaching divergent results in *Braen* and *Garner*, the

Third and Eighth Circuits actually concur on the methodology for framing their conclusions. Simply stated, the opposite results, *per se*, do not create a conflict. Rather, the decisions are attributable to the fact that the prevailing standard of proof in matters of fraud and in matters of intentional and malicious injury are different. The Eighth Circuit in *Garner* employed an analytical/historical approach to the problem later echoed by the Third Circuit in the instant matter. In *Garner*, the Eighth Circuit observed:

> While the legislative history is scant as to this issue, we feel that it is fair to presume that Congress was aware that the prevailing view at the time of adoption was that fraud, for both Section 523 and state common law purposes, had to be proved by clear and convincing evidence. [881 F.2d at 582]

Here, the Third Circuit noted that, "...with the sole exception of defamation in 'public figure' cases, states normally require that malice in the context of a tort suit be proven by a preponderance of the evidence." (A8); 900 F.2d at 625. The Third Circuit then proceeded to distinguish the pre-*Garner* holdings in the Section 523(a)(2) fraud cases on the following grounds:

> As we have noted, in contrast to actions for malicious prosecution, common law actions for fraud have historically employed the heavier clear and convincing evidence burden of proof. See, e.g., *Lalone v. United States*, 164 U.S. 255, 257 (1896) ("In all proceedings instituted...on the ground of alleged fraud practiced by a defendant upon a plaintiff, the rule is of long standing and is of universal

> application, that the evidence tending to prove the fraud and upon which to found a verdict or decree must be clear and convincing.") Consequently, the fact that virtually all courts have adopted the clear and convincing standard in disputes under Section 523(a)(2) comports with our view that the appropriate burden of proof under Section 523 is the prevailing standard used by courts to resolve the types of claims underlying the particular exception at issue. [A8-9; 900 F.2d at 625-626.]

The Courts in *Braen* and *Garner* dealt with different exceptions to discharge in disparate ways for purposes of assessing the relevant standard of proof. Both Courts nevertheless adhered to a unified line of analysis, reasoning that the prevailing common law standard (Federal and State) delineates the appropriate evidentiary burden in each class of cases under Section 523(a). Therefore, this Court's grant of *certiorari* in *Garner* does not provide any cogent basis for the grant of Braen's petition.

ISSUE NO. 2

THE COURT OF APPEALS CORRECTLY REFUSED TO ALLOW THE PETITIONER A HEARING ON THE ISSUE OF WHETHER THE ALLEGED MALPRACTICE OF HIS ATTORNEYS DEPRIVED HIM OF A FULL AND FAIR OPPORTUNITY TO LITIGATE RESPONDENTS' MALICIOUS PROSECUTION CLAIMS IN THE STATE COURT PROCEEDING SINCE MALPRACTICE WHICH DOES NOT RESULT IN A DENIAL OF FUNDAMENTAL RIGHTS IS NOT SUFFICIENT TO BAR THE APPLICATION OF COLLATERAL ESTOPPEL

After a careful and thorough review of the record, the Court of Appeals concluded that petitioner was not entitled to an evidentiary hearing on the question of the fairness of the state court proceedings. The Court reasoned that petitioner's "...allegations, even if taken as true, would not justify an exception to the general rule of issue preclusion." (A18, n.5); 900 F.2d at 629, n.5. That determination is not in derogation of the letter or spirit of this Court's previous holdings on the application of collateral estoppel. Moreover, the issue presented is not one requiring the invocation of this Court's jurisdiction. This Court and the lower courts have evolved a sound and effective structure for assessing claims that attorney malpractice should prevent the application of collateral estoppel.

A redetermination of an issue previously adjudicated is only warranted if there is reason to doubt the quality, extensiveness and fairness of the procedures followed in the prior litigation. *Kremer v. Chemical Const. Co.*, 456 U.S. 461, 481, (1982); *Montana v. United States*, 440 U.S. 147, 164, n.11, (1979). In *Kremer*, this Court defined the content of the requirement that the first adjudication offer a "full and fair opportunity" to litigate the issue in terms of whether the state court proceedings satisfied the minimal procedural requirements of the Due Process Clause of the Fourteenth Amendment. 456 U.S., at 482. There is no question here that Braen was accorded the full and complete measure of procedural due process. He vigorously cross-examined respondents' witness, marshalled his defense through his own testimony and

the testimony of five (5) witnesses, presented documentary evidence, argued all legal questions and obtained judicial review of the Judgment in post-trial, appeal and certification proceedings. Under the circumstances, no more protection could have been offered, nor was more required, to grant preclusive effect to the state court Judgment. *Kremer v. Chemical Construction Corp.*, 456 U.S. at 481-485.

The decision in *Blonder-Tongue Lab., Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971) is not to the contrary. In *Blonder-Tongue*, the Court overruled *Triplett v. Lowell* 297 U.S. 638 (1936) to the extent that *Triplett* foreclosed a plea of estoppel or *res judicata* by one facing a charge of infringement of a patent that has once been declared invalid. The Court did observe that a plaintiff-patentee who had suffered an adverse judgment in an earlier suit would be "permitted to demonstrate, if he can," that he did not have "a fair opportunity procedurally, substantively and evidentially to pursue his claim the first time." 402 U.S. at 332. The Court furnished this procedural right as a policy matter in order to comprehend the "important concerns about the complexity of patent litigation and the posited hazard that the prior proceedings were seriously defective." The Court did not specify that an evidentiary hearing was required to dispose of the issue, if raised.

In any event, even assuming that the *Blonder-Tongue* mandate in patent cases is relevant here, petitioner was afforded an opportunity in the Bankruptcy Court to attack the fairness of the state

court proceedings. Furthermore, whether petitioner was deprived of "crucial evidence or witnesses" is just one of the several factors enumerated and discussed by the Court as being relevant in considering a claim as to full and fair opportunity to litigate. 402 U.S., at 333. In the final analysis, the Bankruptcy Court properly evaluated the interests of "justice and equity", marked as the touchstones in *Blonder-Tongue*, 402 U.S., at 334, in determining that no relief was justified with regard to Braen's request to relitigate the matter.

The alleged malpractice of Braen's trial counsel, *per se*, does not provide adequate and sufficient grounds to which to challenge issue preclusion. The Court of Appeals commenced its analysis by reference to the "general rule" that "'ignorance or carelessness of an attorney' does not provide a basis for relief from the effects of an adverse civil judgment." (A14); 900 F.2d at 629. The Court then analogized the instant matter to various cases decided under *Rule* 60(b) in which relief from a judgment on the ground of counsel's negligence had been denied. The Court noted that such relief was warranted only in exceptional cases, where "...a client was deprived of his day in court because his lawyer failed altogether to respond to a motion for a default judgment or a motion for summary judgment", citing *Boughner v. Secretary of HEW*, 572 F.2d 976 (3rd Cir. 1978) and *Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808 (4th Cir. 1988). 900 F.2d at 629.

A similar rule has been devised in cases involving the application of collateral estoppel to claims of attorney malpractice. The fact patterns and rationale of exemplary cases like *Ackerman v. Ackerman*, 676 F.2d 898 (2nd Cir. 1982) and *Clark v. Department of Correctional Services*, 564 F. Supp. 787 (S.D.N.Y. 1983) project an onerous standard for the grant of relief from issue preclusion. Under the test, a litigant must show gross or egregious incompetence, materially and adversely affecting the exercise of fundamental rights on the issues in the prior litigation, to secure relief. At a minimum, counsel's errors must have deprived petitioner of the opportunity to have a hearing in state court. Where, as here, a plenary trial was conducted, mere errors in judgment, or even professional negligence on the part of counsel, should not prevent the application of the doctrine of collateral estoppel. Without a lengthy recapitulation, respondents submit that Braen's attack on his earlier representation clearly does not suffice to meet this heavy burden.

It is entirely fair and appropriate to compel litigants like the petitioner to satisfy a rigorous and demanding standard before permitting relitigation of issues previously adjudicated. As Judge Weinfeld incisively observed in *Cerbone v. County of Westchester*, 508 F. Supp. 780, 785-786 (S.D.N.Y. 1981):

> "It would enfeeble the collateral estoppel rule if unsupported and conclusory allegations could call into question a litigant's past opportunity to fully and fairly litigate his case, particularly since the burden of showing that one has been denied a full and fair opportunity rests with the litigant opposing the application of collateral estoppel." [Footnote omitted]

Braen's contention that his attorneys failure to provide the "best defense" constitutes a denial of procedural due process is unavailing. Braen's request for a grant of *certiorari* on that issue should, accordingly, be denied.

ISSUE NO. 3

THE COURT OF APPEALS' DETERMINATION THAT COLLATERAL ESTOPPEL IS APPLICABLE TO THE STATE COURT JURY'S FINDING THAT THE DEBTOR ACTED WITHIN THE PARAMETERS OF § 523(a)(6) ENTIRELY COMPORTS WITH SETTLED LEGAL PRINCIPLES AND DOES NOT GENERATE ANY BASIS FOR A GRANT OF CERTIORARI

In an effort to generate an argument cognizable under Sup. Ct. R. 10, Braen, ignores material portions of the State Court trial record and relies upon inapposite legal precedents. The Court of Appeals' conclusion that the State Court's jury instructions sufficiently charged conduct falling within the confines of 11 U.S.C. § 523(a)(6) is fully supported by the trial record and entirely comports with settled legal principles. Braen's petition for

certiorari should thus be denied.

As the Court of Appeals correctly concluded, Braen's effort to assign error based upon isolated phrases in the State Court's jury charge is unavailing. A court must interpret the totality of the jury instructions. *See, e.g., Cupp v. Naughton*, 414 U.S. 141, 146-47 (1973); *United States v. Piccolo*, 835 F.2d 517, 520 (3d Cir. 1987); *United States v. Clark*, 765 F.2d 297, 303 (2d Cir. 1985). Although Braen argues that in two, isolated instances the State Court jury instructions allowed for a finding of a lack of probable cause based upon negligent or reckless conduct, in analyzing the entire trial record, the Court of Appeals determined that the jury was, on the whole, properly instructed on the standard for a finding of "malice".

As noted by the Court of Appeals, the trial judge twice defined "malicious motive" as requiring intent[14] and further instructed the jury that in order to find Braen liable for malicious prosecution, three distinct elements, one of which required a "malicious motive", must be proved.[15] *In re Braen*, 900 F.2d at 627.

Indeed, as the Court of Appeals observed, the jury's responses

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[14]The trial judge defined malicious motive as "the *intentional* doing of a wrongful or unlawful act without just cause or excuse." *In re Braen*, 900 F.2d at 627 (emphasis in original).

[15]The trial judge instructed the jury as follows:
So, the plaintiff in order to ... prevail ... must prove by a preponderance of the evidence that the defendant caused the criminal proceedings to be instituted against him. And also by a preponderance of the evidence, must prove that there was a lack of reasonable or probable cause for the criminal prosecution. Third, that the defendant or defendants were activated by malicious motive in proceeding with the criminal complaint.

to the special interrogatories clearly established that the jury found Braen, Jr. to have acted intentionally and with an improper motive in wrongfully implicating Laganella:

> 1. Do you find the plaintiff has proved by a preponderance of the evidence that the named defendants acted to bring about or were responsible for the institution of [sic] underlying criminal proceeding against plaintiff?
>
> A. Yes.
>
> 2. Do you find that plaintiff has proved by a preponderance of the evidence that there was a lack of reasonable or probable cause for the criminal prosecution?
>
> A. Yes.
>
> 3. Do you find that the plaintiff has proved by a preponderance of the evidence that the defendant was activated by malicious motive in prosecuting the criminal complaint against the plaintiff.
>
> A. Yes.

In re Braen, 900 F.2d at 627.

Consequently, the Court of Appeals properly rejected Braen's effort to bootstrap isolated sentences in the course of a jury charge into "ambiguous" jury instructions. Contrary to Braen's contention, there is *no* doubt as to the jury's finding that Braen acted with a malicious motive. The Court of Appeals' application of collateral estoppel was thus entirely appropriate.

Braen's reliance on legal precedents in an attempt to establish legal error is unavailing. The decisions relied upon by Braen, *see*,

e.g., Wheeler v. Laudini, 783 F.2d 610 (6th Cir. 1986); *In re Pererira*, 44 B.R. 248 (Bankr. D. Mass. 1984), *all* involve a denial of issue preclusion because the State Court verdict did not encompass the actual litigation of an issue establishing a "willful and malicious injury" under 11 U.S.C. §523(a)(6).

Here, in stark contrast, the jury made an express finding that Braen was actuated by a malicious motive. Furthermore, the tort of malicious prosecution, by definition, requires a maliciouss motive. *Earl v. Winne*, 14 N.J. 119, 134 (1953). The legal precedents relied upon by Braen are thus inapposite.

Braen's failure to advance any argument that would qualify for a grant of *certiorari* pursuant to Sup. Ct. R. 10 requires that the petition be denied.

CONCLUSION

For the reasons set forth above, respondents respectfully suggest that none of the arguments presented by petitioner warrant the issuance of a writ of certiorari.

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